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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

FILED  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY FOSTER,

Defendant.

*Robert M. M...  
CLERK-SANTA FE*

No. CIV-99-0313 SC/LFG  
CR-95-323 SC

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant's Motion to Reconsider (Doc. #7) filed October 18, 1999. Before seeking reconsideration, Defendant filed a notice of appeal on October 14, 1999. Both filings are directed at this Court's order of September 29, 1999, by which Defendant's Second Application or Motion For Writ of Habeas Corpus under 28 U.S.C. § 2241 (CIV Doc. #5; CR Doc. #48) was denied on the merits.

The Court has now given further consideration to Defendant's claims in light of the recent order by the United States Court of Appeals for the Tenth Circuit in *United States v. Buck*, No. 99-2129, 1999 WL 811685 (10th Cir. Oct. 12, 1999). As pointed out in *Buck*, because Defendant is not incarcerated in this judicial district, this Court does not have jurisdiction to consider his § 2241 motion. Instead of considering the merits of Defendant's claims, the Court should have "dismiss[ed] [the § 2241 motion] without prejudice to asserting the claim in a proper forum." *Buck*, No. 99-2129, slip op. at 6. It appears the motion to reconsider should be granted, if not for the reasons asserted by Defendant.

On the other hand, because Defendant has filed his notice of appeal, this Court is without

jurisdiction to grant the motion to reconsider. If a party files both a notice of appeal and a motion to reconsider, the district court retains jurisdiction to deny, but not to grant, the motion. *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 579 n.4 (10th Cir. 1996) ("the district court must notify us if it intends to grant the Rule 60(b) motion and seek a remand for that purpose."); *Calva Products, Inc. v. Beal, Bridgeforth & Beal*, Nos. 94-2187, 95-2016, 1995 WL 681484, at \*\*2 (10th Cir. Nov. 2, 1995). The Court of Appeals will be notified of this proposed ruling, and remand will be sought.

IT IS THEREFORE ORDERED that the Clerk is directed to forward a copy of this order to the United States Court of Appeals for the Tenth Circuit;

IT IS FURTHER ORDERED that the Court of Appeals is hereby NOTIFIED that, but for lack of jurisdiction, this Court would grant Defendant's Motion to Reconsider (Doc. #7) filed October 18, 1999, though not on the grounds asserted by Defendant, and on remand would dismiss Defendant's § 2241 motions (CIV Doc. #1; CR Doc. #46 and CIV Doc. #5; CR Doc. #48) without prejudice to asserting his claim in a proper forum; and remand is REQUESTED for this purpose;

IT IS FURTHER ORDERED that, in light of the conclusion herein, Defendant's motion for leave to proceed on appeal under 28 U.S.C. § 1915 (Doc. #9) filed October 14, 1999, is DENIED, and no certificate of appealability will be issued.

  
UNITED STATES DISTRICT JUDGE